

23306

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35688

**TRANSCO RAILWAY PRODUCTS INC.
-- ACQUISITION AND OPERATION EXEMPTION
D&W RAILROAD LLC**

**ENTERED
Office of Proceedings**

NOV 5 - 2012

**Part of
Public Record**

MOTION TO DISMISS

Contemporaneously with this Motion to Dismiss, Transco Railway Products Inc. ("Transco") has filed with the Surface Transportation Board (the "Board") a Verified Notice of Exemption (the "Notice"), pursuant to 49 C.F.R. § 1150.31 *et seq.*, to acquire and operate over certain rail track (the "Subject Tracks") owned by D&W Railroad LLC ("D&W LLC"). Transco hereby moves the Board to dismiss the Notice. Transco believes it does not need Board authority to acquire and operate over the Subject Tracks because the Subject Tracks are excepted yard track, pursuant to 49 U.S.C. § 10906. Transco's subsequent use of the Subject Tracks for non-common carrier purposes would not convert the Subject Tracks into regulated main line track.

I. INTRODUCTION AND BACKGROUND

Transco is a non-common carrier industry that performs car repair services, among other places, at a facility located in Oelwein, Iowa (the "Facility"). Transco has operated the Facility since 1969. Iowa Northern Railway Company ("IANR") currently provides common carrier rail service to the Facility. Prior to IANR, the Facility was served by Union Pacific Railroad ("UP") and, before that by Chicago and North Western Transportation Company ("CNW").

In 2003, an affiliate of Transco, D&W Railroad, Inc. ("DWR"), acquired from Union Pacific Railroad ("UP") rail line from Dewar, IA to Oelwein, IA (the "Main Line")¹ and the Subject Tracks, as well as the underlying real property.² The related notice of exemption filing with the Board identified the Subject Tracks as part of the acquisition transaction, but, importantly, referred to the Subject Tracks as "yard track". See STB Finance Docket No. 34401, *D&W Railroad, Inc. - Acquisition Exemption - Rail Lines of Union Pacific Railroad Company*, served October 8, 2003.

Pursuant to an operating agreement between DWR and IANR, IANR has provided common carrier rail service over the Main Line since 2003. IANR's notice of exemption filing with respect to its operations over the Main Line similarly referred to the Subject Tracks as "yard track". See STB Finance Docket No. 34402, *Iowa Northern Railway Company -- Operation Exemption -- Rail Lines of D&W Railroad, Inc.*, served October 8, 2003.

In 2005, D&W LLC, an affiliate of Transco and DWR, acquired from DWR all of DWR's track (and underlying property rights), including the Subject Tracks, and took assignment of the operating agreement between DWR and IANR. In the related notice of exemption, D&W LLC noted that the conveyance of the Subject Tracks would not require Board authority, pursuant to 49 U.S.C. § 10906.³

¹ The Main Line includes rail line between milepost 332.0 at Dewar, IA and milepost 354.3 at Oelwein, IA, and between milepost 245.58 and milepost 245.0, at Oelwein, as well as 0.32 miles of wye track at Oelwein, IA, which connects the East Leg track (as defined below) to the Main Line.

² DWR also acquired incidental trackage rights over UP's track between milepost 332.0 (Dewar, IA) and milepost 326.2 (Waterloo, IA).

³ In its notice of exemption, D&W LLC noted that the Subject Tracks would be conveyed to "a noncarrier third party". Finance Docket No. 34770, *D&W Railroad, LLC -- Acquisition Exemption -- D&W Railroad, Inc.*, filed October 24, 2005. Initially, it was contemplated that the Subject Tracks, at the time, would be

The Subject Tracks are located wholly in what formerly was a UP (and, before that, CNW) rail yard. The Facility is located adjacent to the Subject Tracks.

The Subject Tracks generally consist of (1) a series of approximately 24 parallel, stub-ended track segments, the longest of which is about 1.0 miles ("Stub-ended Tracks"); (2) track segments that connect to the Main Line, which segments include three parallel tracks northeast of the Stub-ended Tracks (identified on the maps as Track Nos. 0, 1 and 2) and the tracks identified on the maps as the "Depress Track", the "Back Lead", and the "Freight Track"(which is the track that leads to the Facility), and (3) the track segments identified on the maps as the "Round House Track" and the "Diesel Track", each of which connects to the Freight Track, and the "Crossover" track, which connects the Freight Track to the Back Lead track. The aggregate length of the Subject Tracks is approximately 23 miles. The Subject Tracks include all tracks that meet the following three criteria: the track is located west of the Main Line, north of Fourth Street S.W. and south of 50th Street. The Subject Tracks are identified in black on the map attached hereto as Attachment 1.

IANR uses the Subject Tracks for the purpose of dropping off inbound rail cars to the Facility and picking up out-bound rail cars from the Facility. IANR does not use the Subject Tracks to serve or access other rail customers.

Transco uses the Subject Tracks almost exclusively to store and stage rail cars delivered to the Facility for repairs, prior to working on such cars, as well as to store and stage already-repaired cars prior to IANR's outbound movement. Transco uses a Trackmobile or small switch engine to move rail cars around the Subject Tracks, and to and from its Facility. Transco does not hold itself out to perform common carrier rail services on the Subject Tracks for any other

conveyed to Transco. However, that transaction never occurred, and the Subject Tracks were instead conveyed to D&W LLC, along with the Main Line.

party. Following its acquisition of the Subject Tracks, Transco contemplates that its use of the Subject Tracks will continue unchanged.

II. USE OF THE TRACKS - PRESENT, PAST AND FUTURE

IANR uses the Subject Tracks to drop off and pick up rail cars to and from the Facility. IANR does not serve or access any customers via the Subject Tracks, other than Transco. IANR also does not use the Subject Tracks to perform any yard activities, such as storage or switching of rail cars. Instead, IANR uses Bryant Yard in Waterloo, IA as its main yard facility. In addition, Transco, not IANR, maintains the Subject Tracks. In short, IANR's use of the Subject Tracks is not an integral or necessary part of its common carrier operations, and Transco's acquisition of the Subject Tracks will not adversely affect any of IANR's customers.

From the late 1970s/early 1980s until 2003, Transco understands that CNW, and then UP, each similarly used the Subject Tracks almost exclusively for dropping off and picking up rail cars moving to or from the Facility. Between 1969 and the late 1970s/early 1980s, Transco understands that CNW used the Subject Tracks as an active yard -- such as for building its trains--but CNW never accessed any customers other than Transco via the Subject Tracks. Since Transco has occupied the Facility -- for more than 40 years -- no common carrier rail service has been provided on the Subject Tracks.

Transco's current and historical use of the Subject Tracks is and has been almost exclusively for storing and staging rail cars delivered to the Facility for repairs, either prior to or subsequent to their repair, and for moving rail cars around the Subject Tracks and to and from the Facility. Today, Transco typically stores or stages between 1,000 and 1,200 rail cars on the Subject Tracks, but that number may be as high as 1,800. Transco does not hold itself out to

provide common carrier rail service on the Subject Tracks to other facilities. Transco does not pay storage charges for its use of the Subject Tracks.

Transco has no intention to change its current use of the Subject Tracks following its acquisition of the tracks. Transco will not hold itself out to perform any common carrier rail services on the Subject Tracks for the benefit of another facility, and no other facilities are currently located (or expected to be located) on property adjacent to the Subject Tracks.

III. STATEMENT OF LAW

Under 49 U.S.C. 10906, the Board does not have authority over the acquisition of certain types of track. Yard track is a type of track that falls under section 10906. *See* STB Finance Docket Nos. 34462 and 34462 (Sub-No. 1), *MVC Transportation, LLC -- Acquisition Exemption -- P&LE Properties, Inc.; MVC Transportation, LLC -- Petition for Declaratory Order*, 2004 STB LEXIS 666, at *9, served October 20, 2004 ("Yard track is typically considered to be excepted....") ("*MVC*") (*citing Nicholson v. I.C.C.*, 711 F.2d 364 (D.C. Cir. 1983)). Similar to *MVC*, the Subject Tracks are largely stub-ended and are situated wholly within former UP and CNW yard limits. The Subject Tracks do not extend IANR's rail service into new territory. Instead, the current and historical use of the Subject Tracks is for yard activities (such as the storing and switching of rail cars), and not for common carrier rail operations. Therefore, consistent with the *MVC* case, the Board should find the Subject Tracks to be excepted track under 49 U.S.C. § 10906.

As excepted track under 49 U.S.C. § 10906, Transco may acquire the Subject Tracks without Board authority. Transco will not hold itself out to perform common carrier rail services on the Subject Tracks for any other rail customers. Moreover, no rail customer will lose rail service as a result of the acquisition and operation of the Subject Tracks by Transco. Under

these circumstances, Transco's acquisition and use of the Subject Tracks should not be regulated by the Board.

IV. NOTIFICATION TO IANR

Attached hereto as Attachment 2 is the Verified Statement of Daniel R. Sabin, President of IANR, regarding IANR's use of the Subject Tracks. Contemporaneous with filing this Motion with the Board, Transco has served a copy of the Motion on IANR, so IANR can be fully apprised of this proceeding. Attached hereto as Attachment 3 is a Certificate of Service regarding Transco's service of the Motion on IANR.

V. TRANSCO VERIFIED STATEMENT

Attached hereto as Attachment 4 is the Verified Statement of Stephen Masters, who currently holds the position of Vice President of Operations at Transco. Mr. Masters has worked for Transco at the Facility since 1969.

VI. CONCLUSION

For the foregoing reasons, Transco requests that the Board grant its Motion to Dismiss the Notice filed in this proceeding. The transactions that are subject to the Notice are not regulated by the Board. Accordingly, no Board approval is required for Transco to acquire and

operate over the Subject Tracks.

Respectfully submitted,

A handwritten signature in black ink, reading "Rose-Michele Nardi". The signature is written in a cursive, flowing style.

Rose-Michele Nardi
Weiner Brodsky Sidman Kider PC
Fifth Floor
1300 19th Street, NW
Washington, DC 20036

Attorneys for:

Transco Railway Products Inc.

Dated: November 5, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35688

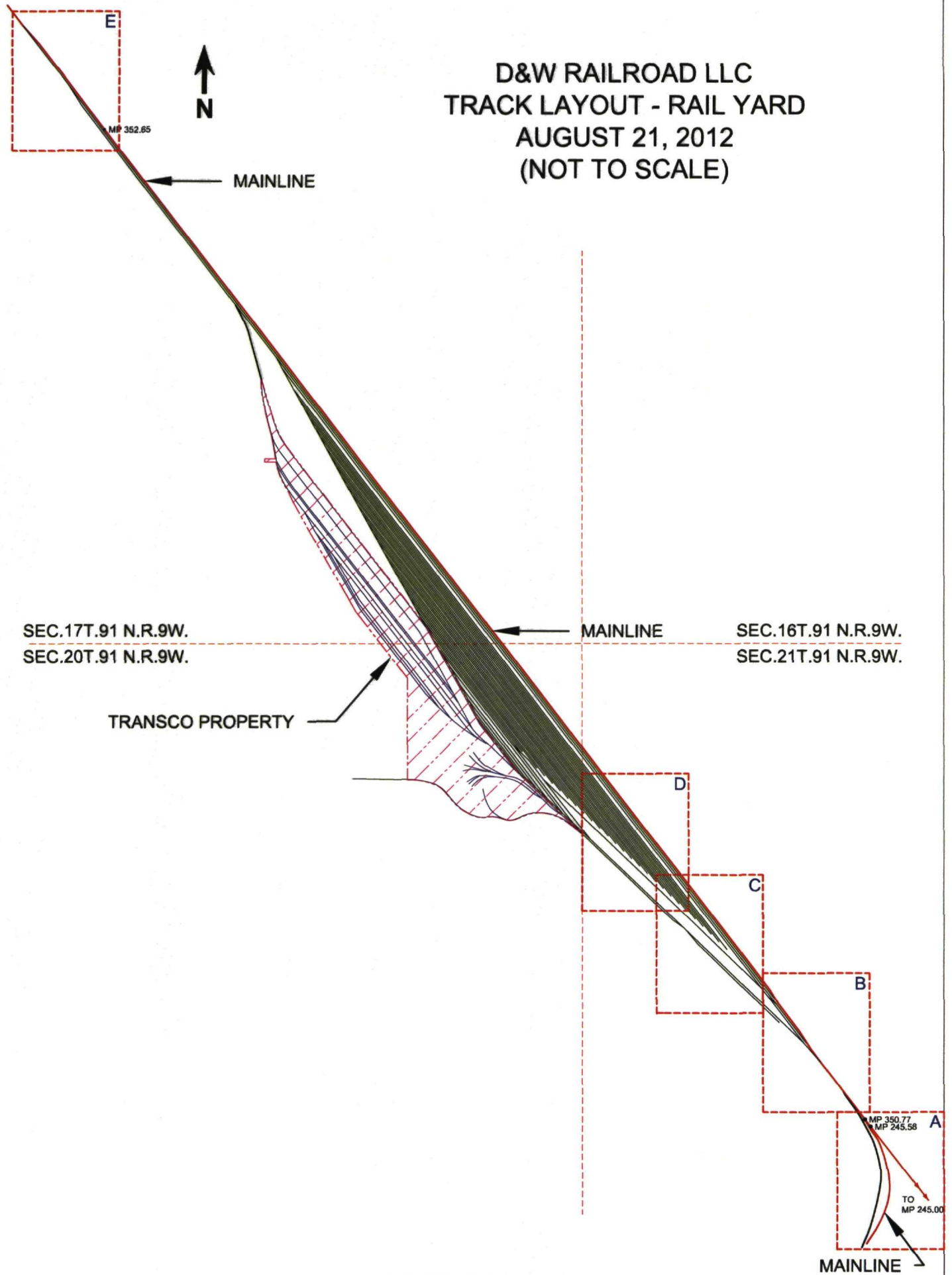
**TRANSCO RAILWAY PRODUCTS INC.
– ACQUISITION AND OPERATION EXEMPTION –
D&W RAILROAD LLC**

MOTION TO DISMISS

ATTACHMENT 1

MAPS OF SUBJECT TRACKS

D&W RAILROAD LLC
TRACK LAYOUT - RAIL YARD
AUGUST 21, 2012
(NOT TO SCALE)



D&W RAILROAD LLC
TRACK LAYOUT - DETAIL A
AUGUST 21, 2012
(NOT TO SCALE)

● MP 350.77
● MP 245.58

EAST LEG

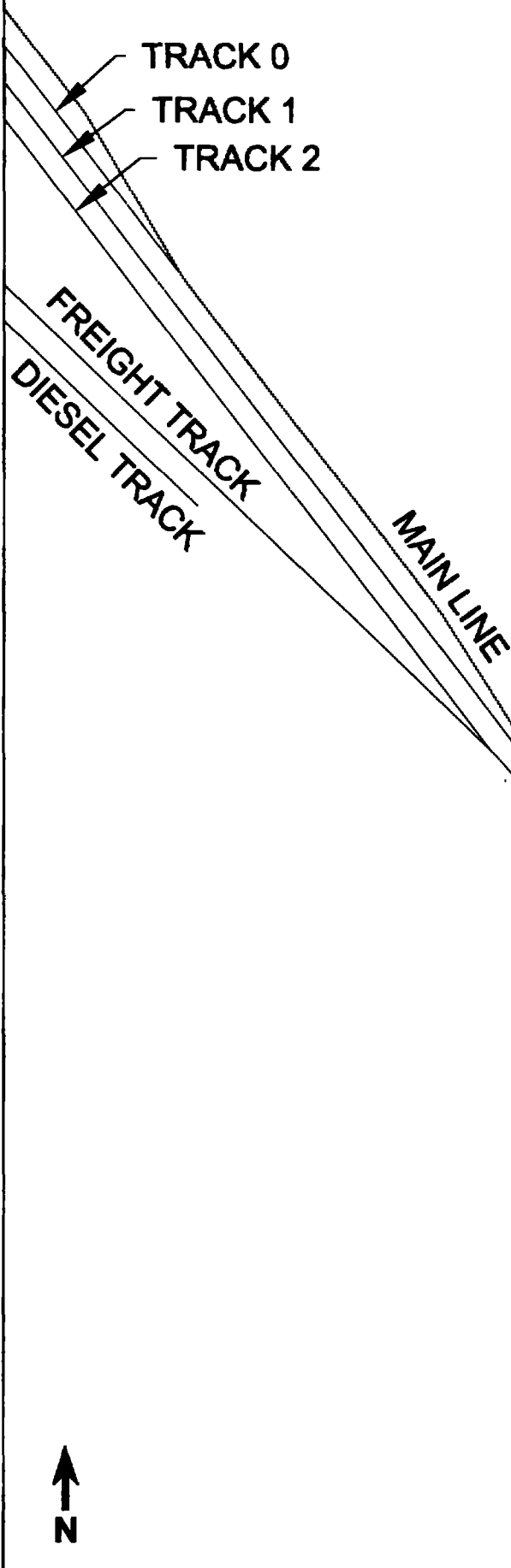
MAIN LINE

DEPRESS TRACK

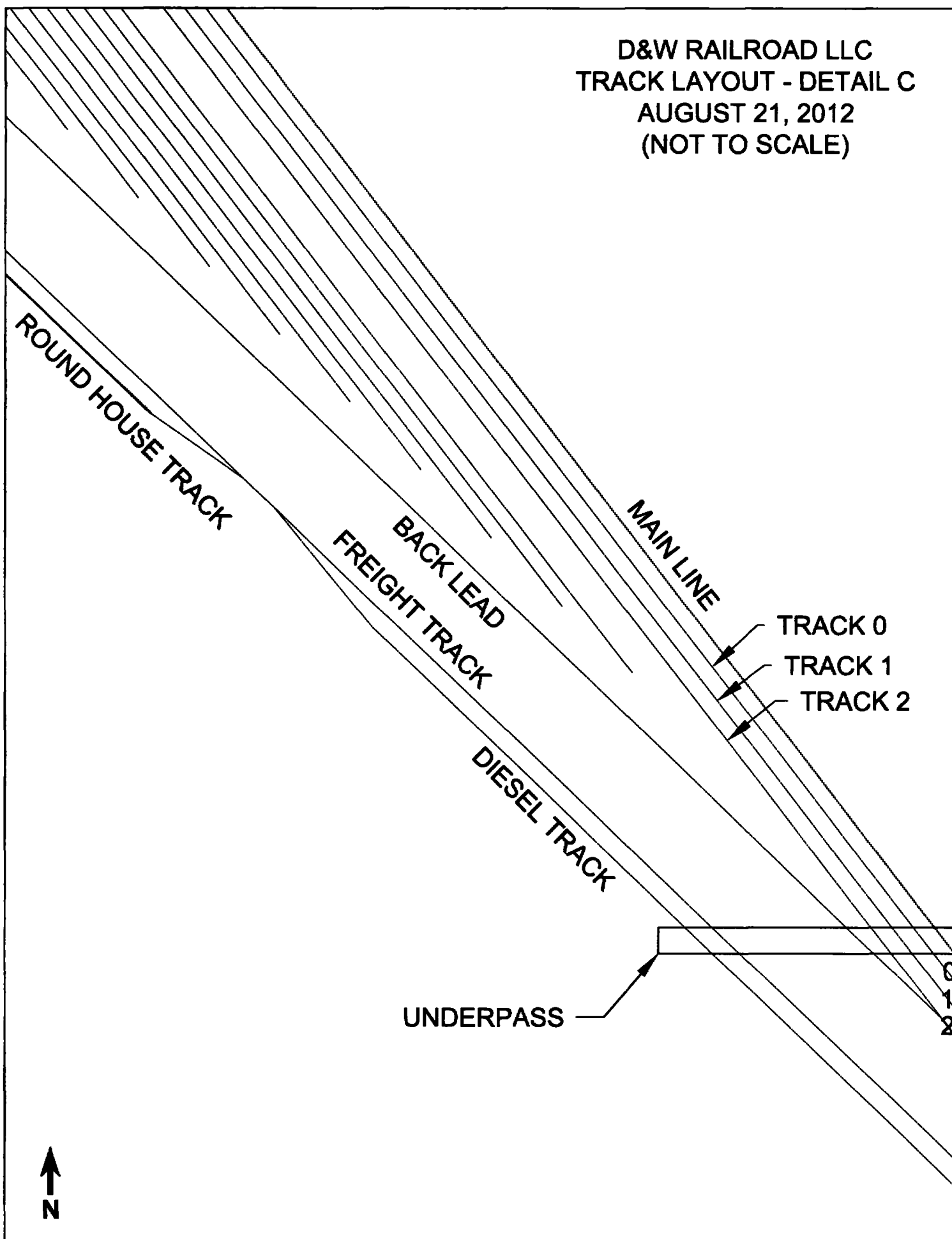
TO MP 245.00



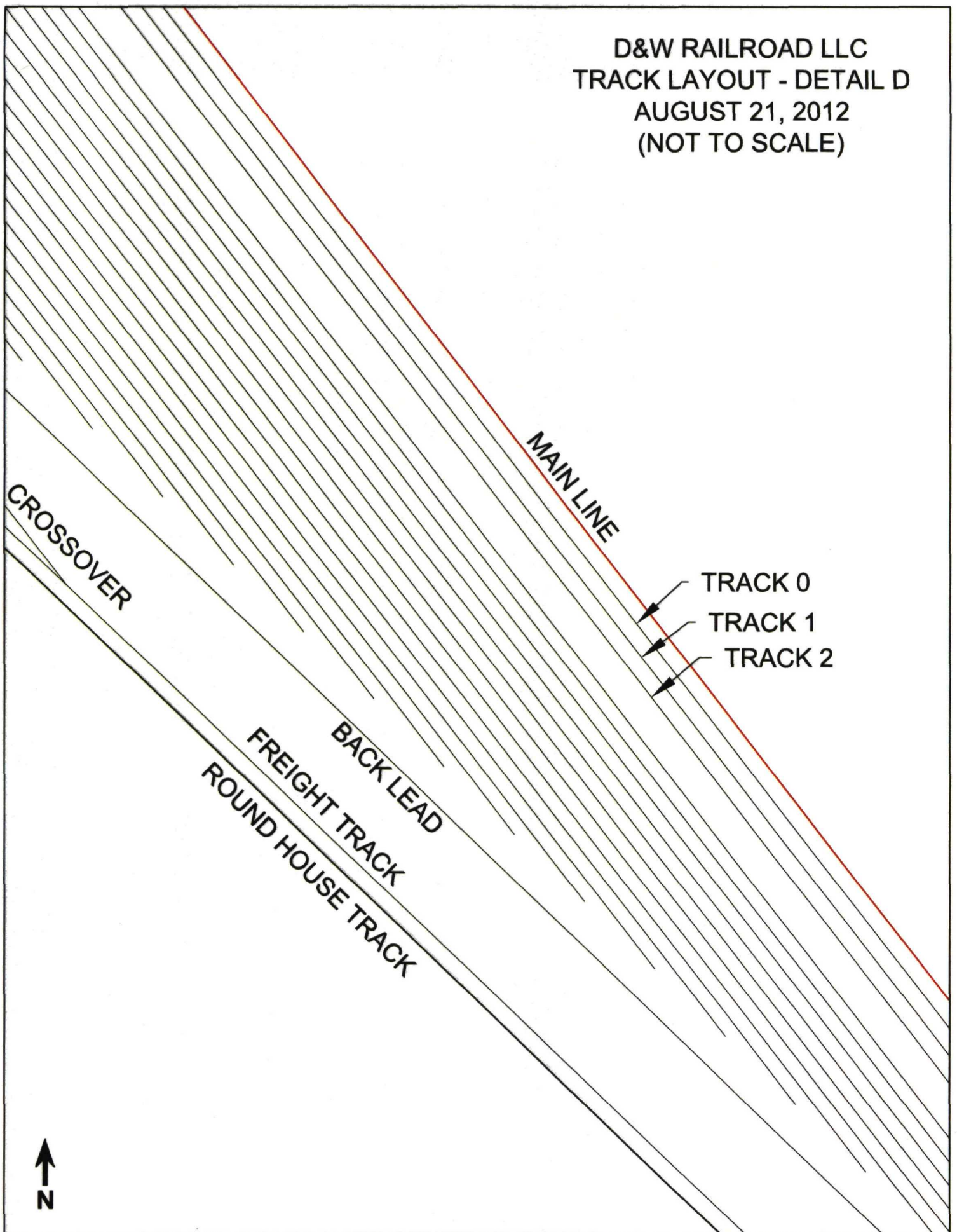
D&W RAILROAD LLC
TRACK LAYOUT - DETAIL B
AUGUST 21, 2012
(NOT TO SCALE)



D&W RAILROAD LLC
TRACK LAYOUT - DETAIL C
AUGUST 21, 2012
(NOT TO SCALE)



D&W RAILROAD LLC
TRACK LAYOUT - DETAIL D
AUGUST 21, 2012
(NOT TO SCALE)



D&W RAILROAD LLC
TRACK LAYOUT - DETAIL E
AUGUST 21, 2012
(NOT TO SCALE)

MAIN LINE

TRACK 0

TRACK 1

MP 352.65

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D&W RAILROAD LLC**

MOTION TO DISMISS

ATTACHMENT 2

VERIFIED STATEMENT OF IANR

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35688

**TRANSCO RAILWAY PRODUCTS INC.
--ACQUISITION AND OPERATION EXEMPTION--
D&W RAILROAD, LLC**

MOTION TO DISMISS

ATTACHMENT 2

**VERIFIED STATEMENT OF
IOWA NORTHERN RAILWAY COMPANY**

1. I am Daniel R. Sabin, President of Iowa Northern Railway Company ("IANR"). I have been the President of IANR since 1994, a period of eighteen years.

2. IANR provides common carrier rail service over the rail line between milepost 332.0 at Dewar, IA and milepost 354.3 at Oelwein, IA, and between milepost 245.58 and milepost 245.0, at Oelwein, IA, as well as 0.32 miles of wye track at Oelwein (the "Main Line"). IANR serves the car repair facility operated by Transco Railway Products Inc. ("Transco") in Oelwein, IA (the "Facility") via the Main Line.

3. The Subject Tracks generally consist of (a) a series of approximately 24 parallel, stub-ended track segments, the longest of which is about 1.0 miles ("Stub-ended Tracks"); (b) track segments that connect to the Main Line, which segments include three parallel tracks northeast of the Stub-ended Tracks (identified as Track Nos. 0, 1 and 2 on the map attached to the Motion to Dismiss in this proceeding) and the tracks identified on the map as the "Depress

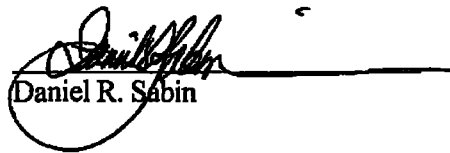
Track", the "Back Lead", and the "Freight Track"(which is the track that leads to the Facility), and (c) the track segments identified on the map as the "Round House Track" and the "Diesel Track", each of which connects to the Freight Track, and the "Crossover" track, which connects the Freight Track to the Back Lead track. The aggregate length of the Subject Tracks is approximately 23 miles. The Subject Tracks include all tracks that meet the following three criteria: the track is located west of the Main Line, north of Fourth Street S.W. and south of 50th Street. (The track identified on the map as the "East Leg" track is not part of the Subject Tracks.) The Subject Tracks are in black on the map attached to the Motion to Dismiss in this proceeding.

4. IANR has never used the Subject Tracks to serve or access any rail customers other than Transco. IANR also does not use the Subject Tracks for yard activities, such as storing or switching rail cars; instead, IANR uses Bryant Yard in Waterloo, IA as its main yard facility. Also, Transco, not IANR, maintains the Subject Tracks.

5. IANR's use of the Subject Tracks is exclusively for dropping off inbound rail cars to the Facility and picking up out-bound rail cars from the Facility. The transfer of the Subject Tracks from D&W LLC to Transco, a non-carrier entity, will not adversely affect any of IANR's customers. IANR's use of the Subject Tracks is not an integral or necessary part of its common carrier operations, and Transco's acquisition of the Subject Tracks will not adversely affect any of IANR's customers.

VERIFICATION

I, Daniel R. Sabin, certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to submit this Verified Statement.



Daniel R. Sabin

Dated: November 2, 2012

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-- ACQUISITION AND OPERATION EXEMPTION --
D&W RAILROAD LLC**

MOTION TO DISMISS

ATTACHMENT 3

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that the Motion to Dismiss of Transco Railway Products Inc. in Finance
Docket No. 35688, was served on November 5, 2012, by first-class mail, postage pre-paid, on
the following:

Iowa Northern Railway Company
Attn: Daniel Sabin, President
Paramount Theatre Building
305 Second Street. SE, Suite 400
Cedar Rapids, IA 52401


Rose-Michele Nardi

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-- ACQUISITION AND OPERATION EXEMPTION --
D&W RAILROAD LLC**

MOTION TO DISMISS

ATTACHMENT 4

VERIFIED STATEMENT OF TRANSCO

**BEFORE THE
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--ACQUISITION AND OPERATION EXEMPTION--
D&W RAILROAD, LLC**

MOTION TO DISMISS

ATTACHMENT 4

**VERIFIED STATEMENT OF
STEPHEN MASTERS**

1. I am Stephen Masters, Vice President of Operations of Transco Railway Products Inc. ("Transco"). I have worked at the Transco car repair facility in Oelwein, IA (the "Facility") since 1969. Prior to my current position, I was plant manager of the Facility for approximately 19 years.

2. The Facility receives common carrier rail service from Iowa Northern Railway Company ("IANR") via the Main Line. The Main Line runs between milepost 332.0 at Dewar, IA and milepost 354.3 at Oelwein, IA, and between milepost 245.58 and milepost 245.0, at Oelwein, IA, and also includes 0.32 miles of wye track at Oelwein.

3. The tracks at issue in this proceeding (the "Subject Tracks") generally consist of (a) a series of approximately 24 parallel, stub-ended track segments, the longest of which is about 1.0 miles ("Stub-ended Tracks"); (b) track segments that connect to the Main Line, which segments include three parallel tracks northeast of the Stub-ended Tracks (identified on the map attached to

the Motion to Dismiss as Track Nos. 0, 1 and 2) and the tracks identified on that same map as the "Depress Track", the "Back Lead", and the "Freight Track"(which is the track that leads to the Facility), and (c) the track segments identified on the map attached to the Motion to Dismiss as the "Round House Track" and the "Diesel Track", each of which connects to the Freight Track, and the "Crossover" track, which connects the Freight Track to the Back Lead track. The Subject Tracks, which are identified in black on the map, include all tracks that meet the following three criteria: the track is located west of the Main Line, north of Fourth Street S.W. and south of 50th Street.

4. The aggregate length of the Subject Tracks is approximately 23 miles. The Subject Tracks are wholly located in what formerly was a rail yard operated by Union Pacific Railroad ("UP") (and, before that, by Chicago and North Western Transportation Company ("CNW")). The Facility is located adjacent the Subject Tracks.

5. It is my understanding that Transco has operated the Facility since 1969, and that the Facility has always had the primary function of performing rail car repair services. Prior to IANR, CNW and then UP provided the Facility with common carrier service via the Main Line.

6. Since I have worked for Transco, it has used the Subject Tracks almost exclusively to store and stage rail cars delivered to the Facility for repairs, prior to working on such cars, as well as to store and stage already-repaired cars prior to IANR's outbound movement. Transco uses a Trackmobile or small switch engine to move rail cars around the Subject Tracks, and to and from the Facility. Currently, Transco typically stores or stages between 1,000 and 1,200 rail cars on the Subject Tracks, but that number may be as high as 1,800 rail cars. Transco does not pay storage charges for the use of the Subject Tracks.

7. There are no other entities currently located (or to my knowledge expected to be located) adjacent to the Subject Tracks. Transco does not hold itself out to provide common carrier rail service on the Subject Tracks to other facilities. Following Transco's acquisition of the Subject Tracks, Transco contemplates that its use of the Subject Tracks will continue unchanged.

8. In 2003, it is my understanding that (i) an affiliate of Transco, D&W Railroad, Inc. ("DWR"), acquired from UP the Main Line (and the underlying real property), the Subject Tracks (and the underlying real property) and incidental trackage rights between milepost 332.0 (Dewar, IA) and milepost 323.2 (Waterloo, IA), and (ii) DWR entered into an operating agreement with IANR. IANR has provided common carrier rail service over the Main Line since 2003. In 2005, it is my understanding that D&W LLC, an affiliate of DWR and Transco, acquired from DWR all of its track (and real property rights), and took assignment of the operating agreement between DWR and IANR. I also understand that at the time D&W LLC filed its notice of exemption with the Surface Transportation Board, it was contemplated that DWR would sell the Subject Tracks to Transco rather than D&W LLC, but that transaction never occurred. Instead, it is my understanding that the Subject Tracks were conveyed to D&W LLC, along with the Main Line and the trackage rights.

9. From the late 1970s/early 1980s, CNW, and then UP, also each used the Subject Tracks almost exclusively for dropping off and picking up rail cars moving to or from the Facility. Between 1969 and the late 1970s/early 1980s, it is my understanding that CNW used the Subject Tracks as an active yard, including for building trains, but that CNW never accessed any customer other than Transco via the Subject Tracks. In the more than 40 years since Transco

has occupied the Facility, it is my understanding that the Subject Tracks have not been used to provide common carrier rail service.

VERIFICATION

I, Stephen Masters, certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to submit this Verified Statement.


Stephen Masters

Dated: November 5, 2012
